

Workplace Injuries & *2010 NJAJ Meadowlands Seminar Guide*

Navigate Through the Intentional Tort Exception to The New Jersey Workers' Compensation Act

By Dario J. Badalamenti

The New Jersey Workers' Compensation Act, N.J.S.A. 34:15-1 et seq., provides the exclusive remedy available to employees injured by accident during the scope of their employment. The act's so-called "exclusivity provision," N.J.S.A. 34:15-8, enters by operation of law into every contract of hiring made in the state, and requires "a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination." See 1 Arthur Larson & Lex Larson, *Larson's Workers' Compensation Law*, §1.0.1 (2002). This exclusive remedy is designed to "maintain the balance of sacrifices between employer and employee in the substitution of no-fault liability for tort liability." See 6 *Larson*, §103.03. As our Supreme Court explained in *Dudley v. Victor Lynn Lines, Inc.*, 32 N.J. 479 (1960), "by accepting the ben-

Badalamenti is an associate with Marshall, Dennehey, Warner, Coleman & Goggin in Roseland.

efits of the [Act], an employer assumes an absolute liability, but gains immunity from common-law suit, even though he be negligent, and the employee foregoes his right to sue his employer for negligence, but gains a speedy and certain, though smaller, measure of damages for all work-connected injuries, regardless of fault."

The basic principle that remedies available to an injured worker under the act are exclusive of all other remedies is at the core of New Jersey's workers' compensation scheme. However, recent challenges to this exclusivity have threatened to compromise the immunity from common-law suit afforded employers since the advent of the act. These challenges have focused primarily on the limited intentional tort exception to the exclusivity rule as set forth in N.J.S.A. 34:15-8. Under the terms of this provision, an employee may bring an action against his employer at common law for any act or omission which is an "intentional wrong." It is the definition of "intentional wrong" which is at the heart of these controver-

sies. A recent decision by the Appellate Division demonstrates how the courts will attempt to maintain a balance of sacrifices between employer and employee in determining what conduct constitutes intentional wrongdoing by an employer.

In *Calavano v. Federal Plastics Corp.*, L-492-07, 2010 WL 3257784 (N.J. Super. A.D. Aug. 18, 2010), the plaintiff was severely injured while cleaning a vertical blender on the defendant's premises. Plaintiff, a 22-year employee of defendant, had operated the vertical blender for approximately 16 years and was well acquainted with the proper safety procedures in cleaning the machine. On the day of the accident, plaintiff was cleaning the base of the blender to remove residue. As per defendant's established safety protocol, plaintiff had turned off the machine's power prior to cleaning. Upon noticing a piece of debris hanging from one of the blender's blades, plaintiff opened a small door at the base of the machine and inserted his hand to remove the debris. As he did so, the machine powered on and the lower half of plaintiff's arm was severed.

Plaintiff filed a complaint against defendant in tort for alleging intentional wrongdoing. The complaint asserted that defendant failed to install an interlock safety device on the vertical blender which would have prevented it from powering on as long as the door allowing access to the blender was open. Plaintiff pointed to the installation of an interlock

device on the blender within days of his accident as evidence of defendant's wrongdoing and knowledge of the existing risk. Finding that plaintiff failed to demonstrate that defendant's conduct met the standard necessary to trigger the intentional tort exception to the exclusivity rule, the lower court granted summary judgment in favor of defendant. Plaintiff appealed.

In affirming the lower court's ruling, the Appellate Division relied on a string of New Jersey Supreme Court cases beginning with *Millison v. E.I. du Pont de Nemours & Co.*, 101 N.J. 161 (1985). In *Millison*, the Supreme Court adopted Prosser's "substantial certainty" standard to be utilized in evaluating employer intentional tort actions. See *W. Prosser & W. Keeton, The Law of Torts*, §8 (5th Ed., 1984). As the Court explained, "the meaning of intent is that an actor desires to cause consequences of his act or it is substantially certain that such consequences will result from his actions."

In *Laidlow v. Hariton Machinery Co.*, 170 N.J. 602 (2002), the Supreme Court undertook another examination of the intentional wrong exception in the context of an industrial accident where the employer had disengaged a safety device for reasons of speed and efficiency. The Court delineated a two-prong test to be utilized by judges who must consider and decide summary judgment motions based on the exclusivity provision. This test requires not only that the conduct of the employer be examined, but also the context of the event in question. As the Court instructed:

[T]he trial court must make two separate inquiries. The first is whether, when viewed in a light most favorable to the employee, the evidence could lead a jury to conclude that the employer acted with knowledge that it was

substantially certain that a worker would suffer injury. If that question is answered affirmatively, the trial court must then determine whether, if the employee's allegations are proved, they constitute a simple fact of industrial life or are outside the purview of the conditions the Legislature could have intended to immunize under the Workers' Compensation bar.

The Supreme Court again returned to the issue of an employer's common-law tort liability in two recent cases that illustrate application of the *Laidlow* rule. See *Mull v. Zeta Consumer Products*, 176 N.J. 385 (2003) (employer's conduct in disengaging critical safety devices on a piece of equipment precluded summary judgment in favor of employer as employer had knowledge of the machine's dangerous condition due to prior accidents, employee complaints and OSHA violations); and *Crippen v. Central Jersey Concrete Pipe Co.*, 176 N.J. 397 (2003), reversing summary judgment in favor of employer where employer intentionally deceived OSHA, deliberately failed to comply with OSHA directives and had knowledge of the virtual certainty that injury to employees would occur).

It was within the framework of these legal principles that the *Calavano* court found that plaintiff in the instant case could not satisfy the *Laidlow* rule. As to the conduct prong, the court found it significant that the only prior incident involving the vertical blender on which plaintiff was injured was over 25 years prior and was much less severe than the injury suffered by plaintiff. Given this innocuous history, the *Calavano* court concluded that the facts did not allow a finding that injury to plaintiff was a substantial certainty.

Addressing the context prong, the *Calavano* court held that although regret-

table, defendant's failure to install an interlock device before plaintiff's accident was not the type of circumstance which the legislature contemplated would expose an employer to a common-law negligence action.

The *Calavano* court emphasized that the record was devoid of evidence that defendant "ever directed or even suggested that plaintiff should skip any safety steps because of production concerns as in *Laidlow*" or "that OSHA ... was misled as in *Laidlow* and *Crippen*." Rather, the *Calavano* court concluded that plaintiff's injury and the circumstances surrounding it were "part and parcel of everyday industrial life" and "plainly within the legislative grant of immunity."

As the *Calavano* decision and the legal precedents on which it is based clearly demonstrate, there is an inherent tension which exists between New Jersey's workers' compensation no-fault liability scheme and the tort-liability system. At its core are the competing interests of employers and employees. As *Mull* and *Crippen* might suggest, an overly broad application of the exclusivity rule without an adequate statutory remedy for employees can have the unintended effect of encouraging employers to act without regard for their employees' safety. Conversely, liberal exceptions to the exclusivity of the act can potentially frustrate a system designed to reduce the costs of workplace safety through employer immunity from common-law suit. As the Supreme Court cautioned in *Millison*, "the intentional wrong exception ... must be interpreted strictly to prevent the exception from consuming the exclusivity design of the [Act]." Regardless of one's focus, the implications are clear. The continued viability of New Jersey's workers' compensation scheme is dependent on the courts' ability to maintain a balance of sacrifices between employer and employee in addressing ongoing challenges to the act's exclusivity rule. ■